No. 07-1390

In the Supreme Court of the United States

PATRICK MARLOWE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Sentencing Guidelines, as applied in this case, violate the Sixth Amendment to the United States Constitution.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A61) is reported at 514 F.3d 508.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 2008. The petition for a writ of certiorari was filed on May 1, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Tennessee, petitioner, a former corrections officer with the Sheriff's Office in Wilson County, Tennessee, was convicted of one count of conspiracy to deprive detainees and prisoners of their constitutional rights, in violation of 18 U.S.C. 241, and

six counts of deprivation of constitutional rights under color of law, in violation of 18 U.S.C. 242. He was sentenced to life imprisonment. The court of appeals affirmed his sentence. Pet. App. A1-A61.

1. Between 2001 and 2003, petitioner was a supervisory corrections officer in charge of the second shift (4 p.m. to midnight) at the Wilson County Jail. Pet. App. A7; Gov't C.A. Br. 5-6. During that period, petitioner and his co-conspirators (other members of the second shift) planned and carried out brutal assaults on non-threatening detainees and prisoners, at times causing severe injuries. Petitioner routinely assaulted detainees who were loud or obnoxious in the detox cell or who were uncooperative during the booking process. *Id.* at 6-7; Pet. App. A7-A9. Petitioner and his co-conspirators openly discussed their assaults and at times bragged about and re-enacted various assaults. *Id.* at A9; Gov't C.A. Br. 8-9. Petitioner compiled a "knock-out list" that included the names of detainees and prisoners whom he had beaten into unconsciousness. Pet. App. A8. No less than 21 people were on the list. *Ibid.* Petitioner and his co-conspirators covered up the extent and frequency of their assaults by denying injured detainees and prisoners medical care following assaults, writing false reports, and failing to write reports when force was used. *Id.* at A7; Gov't C.A. Br. 9-10.

2. Petitioner was indicted on one count of conspiracy to deprive detainees and prisoners of their constitutional rights (Count 1) and seven counts of deprivation of constitutional rights under color of law (Counts 2-8). Pet. App. A4-A7. Five of the substantive counts were based on beatings of five different detainees or prisoners (*i.e.*, Paul Armes (Count 4); Sergio Martinez (Count 5); Kenneth McIntyre (Count 6); Dartanian McGee (Count 7);

and Larry Clark (Count 8)). *Id.* at A6. Two of those detainees suffered serious bodily injuries: Armes sustained multiple fractures to his cheekbone, and Martinez suffered a broken jaw. Gov't C.A. Br. 3, 15, 18.

The remaining two substantive counts (Counts 2 and 3) arose from the beating and resulting death of Walter Kuntz, a pre-trial detainee. Count 2 alleged that petitioner assaulted Kuntz, resulting in his bodily injury and death; and Count 3 alleged that petitioner failed to provide Kuntz with necessary and appropriate medical care, resulting in his bodily injury and death. Pet. App. A5-A6; Gov't C.A. Br. 3.

Kuntz was brought to the jail on January 13, 2003, after his arrest on suspected traffic violations. Pet. App. A14. He was booked without incident, but he soon began screaming and banging on the door of the detox cell. *Ibid.* After Kuntz refused to quiet down, petitioner entered Kuntz's cell, punched him in the side of the head, and kicked, punched, and kneed him repeatedly in the rib area. *Ibid.*; Gov't C.A. Br. 19. About 30 minutes after this initial beating, petitioner returned to the cell because Kuntz continued to bang on the cell door. Pet. App. A14. Petitioner knocked Kuntz to the ground with a blow to Kuntz's left temple. *Id.* at A15. Petitioner then punched Kuntz in his face and chest and kicked him a few times in the ribs. *Ibid.*; Gov't C.A. Br. 20. As petitioner was leaving Kuntz's cell, another corrections officer sprayed Kuntz with a chemical agent. Pet. App. A15.

A short time later, when Kuntz continued to bang on the cell door, petitioner instructed another corrections officer, Gary Hale, to "take care of the situation." Pet. App. A15. Based on his past experiences with petitioner, Hale interpreted petitioner's instruction to mean that Hale should do whatever it took to stop Kuntz from

hitting the cell door. *Ibid.* Hale therefore entered Kuntz's cell, pushed him onto a bench, and struck him in the side of the head three or four times. Pet. App. 15; Gov't C.A. Br. 21. The punches caused Kuntz's head to bounce off the side of the cell's concrete wall and to make a cracking sound. *Ibid.* When Hale left the cell, Kuntz was lying down, holding his head, and moaning. *Ibid.* Hale then informed petitioner that he had taken care of the situation. Pet. App. A15.

Petitioner failed to provide Kuntz with any medical care for at least six hours after the three beatings. Pet. App. A15-A17. Petitioner knew that, after the beatings, Kuntz began vomiting, lost consciousness, and became unresponsive. *Id.* at A16. Kuntz remained unresponsive even when petitioner shook him, patted him on the back, poured a bucket of ice water over his head and body, and placed smelling salts under his nose, and when another corrections officer checked his pupils for a response. *Ibid.*; Gov't C.A. Br. 22-23. Although petitioner knew that Kuntz had undergone brain surgery a year or two earlier, it was not until shortly before the end of the second shift that petitioner agreed with Hale to contact someone concerning Kuntz's condition. *Id.* at 22-24; Pet. App. A15-A17. The person they contacted, however, was Hale's father, and, when he arrived, they did not tell him that they had beaten Kuntz. *Id.* at A16-A17. Only after Hale's father recommended calling an ambulance did petitioner seek medical assistance for Kuntz. *Id.* at A17.

When the EMTs arrived, petitioner did not tell them that Kuntz had been beaten. Pet. App. A17. The EMTs therefore treated Kuntz for possible alcohol poisoning. *Ibid.* Had the EMTs been told that Kuntz might have suffered a head injury, they would have airlifted him directly to a trauma center; instead, they transported

Kuntz to a local medical center, which then transferred him to a trauma center. *Ibid.*

A neurosurgeon determined that Kuntz's condition was consistent with brain death: Kuntz had suffered a large subdural hematoma that caused irreparable damage to the part of the brain that controls basic metabolic functions such as heartbeat, respiration and level of consciousness. Pet. App. A17-A18; Gov't C.A. Br. 25. Had Kuntz received immediate medical attention following the onset of his symptoms, he could have made a full recovery. *Id.* at 26-27; Pet. App. A18. Instead, two days after the beatings, his family removed him from life support, and he died. *Ibid.*; Gov't C.A. Br. 26.

3. The jury found petitioner guilty of conspiracy and six of the seven civil rights violations (all the charges except Count 8). By special verdict, the jury found that petitioner's beating of Kuntz, charged in Count 2, resulted in Kuntz's bodily injury but not his death. 3:04-cr-00129-1 Docket entry No. 185, at 2 (M.D. Tenn. Jan. 26, 2006) (Verdict Form). On Count 3, however, the jury specifically found that petitioner's failure to provide Kuntz with medical care resulted in Kuntz's death. *Id.* at 2-3.[1]

Based on the jury's finding, petitioner faced a statutory maximum sentence of life imprisonment. See 18 U.S.C. 242 ("if death results from the acts committed in violation of [18 U.S.C. 242] * * * [the defendant] shall be * * * imprisoned for any term of years or for life").

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[1] The verdict form included in petitioner's appendix (Pet. App. D1-D10) is an inaccurate re-creation of the jury's verdict. The re-created verdict form mistakenly indicates that petitioner was found both guilty and not guilty of Counts 1 and 2, and that the jury found that Kuntz both did, and did not, suffer bodily injury from the acts in Count 2.

Petitioner's sentencing range under the advisory United States Sentencing Guidelines (Guidelines), calculated using the 2002 Guidelines manual, was life imprisonment. Pet. App. A31-A32 & n.6. As required under the guideline applicable to violations of 18 U.S.C. 242 (see Guidelines § 2H1.1(a)(1)), the district court calculated petitioner's base offense level for violating Kuntz's civil rights by using the guideline applicable to the underlying conduct because that method resulted in the highest offense level.[2] The district court concluded that the underlying conduct established by petitioner's conviction constituted second degree murder, which yielded a base offense level of 33. 7/6/06 Tr. 118-119; see Guidelines § 2A1.2. Additional enhancements brought petitioner's total offense level to 47. 7/6/06 Tr. 119.[3] After considering the advisory Guidelines range and the other sentencing factors set forth in 18 U.S.C. 3553(a) (2000 & Supp. V 2005), the district court sentenced petitioner to life imprisonment. 7/6/06 Tr. 120-124. The district court also sentenced petitioner to ten years of imprisonment on each of the other six counts of conviction, to run con-

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[2] The applicable guideline directs a district court to use, as the base offense level, the greater of (1) the offense level from the guideline applicable to any underlying offense; (2) 12, if the offense involved two or more participants; (3) ten, if the offense involved the use or threat of force, or the use or threat of property damage; or (4) six, otherwise. Guidelines § 2H1.1(a).

[3] Six levels were added because the offense was committed under color of law, Guidelines § 2H1.1(b)(1)(B); two levels because the victim was restrained, Guidelines § 3A1.3; four levels because petitioner took a leadership role in the offense, Guidelines § 3B1.1(a); and two levels because petitioner's actions following Kuntz's death obstructed justice, Guidelines § 3C1.1. Petitioner has not contested any of those enhancements in this Court.

currently with each other and with his life sentence on Count 3. *Id.* at 124-125.

4. On appeal, petitioner challenged his life sentence on several grounds.[4] In particular, petitioner contended: (1) that, under *Blakely* v. *Washington*, 542 U.S. 296 (2004), *United States* v. *Booker*, 543 U.S. 220 (2005), and *Cunningham* v. *California*, 127 S. Ct. 856 (2007), his sentence violated the Sixth Amendment because the judge, rather than the jury, determined, for sentencing purposes, that petitioner had committed second degree murder (Pet. C.A. Br. 26-32); (2) that his sentence violated the Fifth Amendment because the district court based its sentencing determination on facts that it found by a preponderance of the evidence rather than beyond a reasonable doubt (*id.* at 32-37); (3) that the Constitution requires a jury to determine a defendant's *mens rea* before a judge may impose a sentence that is calculated using the second degree murder guideline (*id.* at 55-59); (4) that applying a rebuttable presumption of reasonableness to a within-Guidelines sentence on appellate review is unconstitutional (*id.* at 37-40); and (5) that the district court's factual finding that petitioner possessed the mental state necessary for second degree murder was clearly erroneous (*id.* at 41-47).

In his opening brief on appeal, petitioner did not argue that the Sentencing Guidelines, "as applied" to his case, violated the Sixth Amendment on the theory that his life sentence could be upheld as reasonable on appellate review only based on the district court's factual finding that he had committed second degree murder. Petitioner raised that claim only in his reply brief, fol-

[4] Petitioner did not challenge any of the ten year sentences that he received for the remaining six counts, and he has not challenged those sentences in this Court.

lowing this Court's decision in *Rita* v. *United States*, 127 S. Ct. 2456 (2007). See Pet. C.A. Reply Br. 1-9.

5. The court of appeals affirmed petitioner's sentence. Pet. App. A1-A61. The court first concluded that the facts supported the district court's finding that petitioner's conduct constituted second degree murder. *Id.* at A31-A37. The court also concluded that petitioner's sentence was both procedurally and substantively reasonable (*id.* at A37-A46) and did not pose constitutional concerns (*id.* at A46-A50). Specifically, the court rejected petitioner's claim that the Sixth Amendment required the jury rather than the judge to make the finding that petitioner acted with the malice necessary to commit second degree murder. Instead, the court of appeals held that judicial fact-finding does not present Sixth Amendment concerns under an advisory Guidelines system. See *id.* at A46-A48 (citing *Booker*, 543 U.S. at 246-249, and *United States* v. *Kosinski*, 480 F.3d 769, 775 (6th Cir. 2007)). The court also held that petitioner's claim that the district court must find facts beyond a reasonable doubt was foreclosed by circuit precedent. *Id.* at A48-A49 (citing *United States* v. *Gates*, 461 F.3d 703, 708 (6th Cir.), cert. denied, 127 S. Ct. 602 (2006)). Finally, the court held that an appellate presumption that a within-Guidelines sentence is reasonable does not violate the Sixth Amendment. Pet. App. A49-A50 (citing *Rita*, 127 S. Ct. at 2463). The opinion for the court did not address petitioner's "as applied" Sixth Amendment claim.

6. Judge Moore concurred in the court's judgment. Pet. App. A51-A61. She wrote separately, however, to address petitioner's "as applied" Sixth Amendment claim. *Id.* at A51-A55. Judge Moore noted that Justice Scalia, concurring in *Rita*, 127 S. Ct. at 2478, and *Gall* v.

United States, 128 S. Ct. 586, 602-603 (2007), had suggested that the Sixth Amendment might be violated if a judge imposed a sentence that could be upheld as reasonable only because of the existence of a judge-found fact. Pet. App. A55-A58. Judge Moore therefore believed that, to resolve petitioner's "as applied" Sixth Amendment claim, she needed to determine whether petitioner's sentence of life imprisonment would be reasonable even if the district court had *not* made its factual finding that petitioner's actions constituted second degree murder. *Id.* at A54-A55.

Because Judge Moore concluded that petitioner's sentence would be reasonable even absent that factual finding, she concurred in the judgment affirming the sentence. Pet. App. A55-A61. She observed that petitioner was the leader of "a violent and depraved conspiracy" (*id.* at A58) in which he and his colleagues "essentially abused inmates for sport" (*id.* at A60) and that petitioner exhibited "depravity and cruelty" (*id.* at A59) in beating Kuntz and then denying him medical care thereby causing his death. Accordingly, Judge Moore concluded that the finding that petitioner committed second degree murder was not necessary to sustain his life sentence as reasonable. *Id.* at A58.

ARGUMENT

Relying primarily on Justice Scalia's concurrences in *Rita* v. *United States*, 127 S. Ct. 2456 (2007), and *Gall* v. *United States*, 128 S. Ct. 586 (2007), petitioner contends (Pet. 13-28) that the Sentencing Guidelines, as applied in his case, violate the Sixth Amendment. Specifically, petitioner argues that his life sentence is unconstitutional because no reviewing court would uphold the sentence as reasonable absent the district court's finding

that petitioner committed second degree murder. That contention lacks merit and does not warrant this Court's review.

1. As the court of appeals observed (Pet. App. A47), the district court recognized that the Sentencing Guidelines are merely "advisory." 7/6/06 Tr. 119. The district court stated that, under *United States* v. *Booker*, 543 U.S. 220 (2005), it should "afford[] the guidelines no presumption" of reasonableness. 7/6/06 Tr. 119. Instead, it "simply ha[d] to calculate the guideline range," "consider it along with [the sentencing factors in 18 U.S.C. 3553(a) (2000 & Supp. V 2005),] and then impose sentence." *Ibid.* Because the Guidelines were advisory, the district court had the discretion to sentence petitioner to any term of imprisonment up to the statutory maximum of life authorized by the jury's finding that petitioner's violation of Kuntz's civil rights resulted in his death. See 18 U.S.C. 242. Under those circumstances, the factual findings made by the district court in exercising its sentencing discretion raise no Sixth Amendment concerns.

Booker and cases elaborating on that decision make clear that, under an advisory Guidelines regime, judicial fact-finding that supports a sentence within the statutory maximum set forth in the United States Code does not violate the Sixth Amendment. As the Court explained in *Booker*:

> We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range. Indeed, everyone agrees that the constitutional issues presented by these cases would have been avoided entirely if Congress had omitted from the [Sentencing Reform Act of 1984] the provisions that make the Guidelines bind-

> ing on district judges * * * . For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.

Booker, 543 U.S. at 233 (citations omitted).

This Court reaffirmed in *Cunningham* v. *California*, 127 S. Ct. 856 (2007), that "there was no disagreement among the Justices" that judicial fact-finding under the Sentencing Guidelines "would not implicate the Sixth Amendment" if the Guidelines were advisory. *Id.* at 866. And, in *Rita*, the Court again confirmed that its "Sixth Amendment cases do not automatically forbid a sentencing court to take account of factual matters not determined by a jury and to increase the sentence in consequence." 127 S. Ct. at 2465-2466; see *id.* at 2467 (noting *Booker*'s recognition that fact-finding by federal judges in application of the Guidelines would not implicate the constitutional issues confronted in that case if the Guidelines were not "binding"). See also *Apprendi* v. *New Jersey*, 530 U.S. 466, 481-482 (2000). Accordingly, any Sixth Amendment challenge based on judicial fact-finding at petitioner's sentencing, including an "as applied" challenge, must fail.

2. Even if an "as applied" challenge were theoretically available, petitioner's challenge would lack merit. Under the reasoning of Justice Scalia's concurrences in *Rita* and *Gall*, petitioner could succeed in such a challenge only if he could demonstrate that his sentence would be unreasonable absent a judge-found fact. See *Rita*, 127 S. Ct. at 2478 (Scalia, J., concurring); *Gall*, 128 S. Ct. at 602-603 (Scalia, J., concurring). Although petitioner contends (Pet. 13-14) that his sentence would be unreasonable absent the district court's finding that he

committed second degree murder, that contention is incorrect, as Judge Moore explained in her concurring opinion. See Pet. App. A58-A61.

As Judge Moore described, the evidence at trial "starkly illustrate[d] the depravity and cruelty of [petitioner's] conduct in this case." Pet. App. A59. The evidence showed that petitioner "prey[ed] upon" detainees and inmates (*id.* at A58) and "abused [them] for sport" (*id.* at A60). Petitioner led other officers in "regularly and severely beating inmates in the jail." *Id.* at A59. He instructed other guards where to strike inmates in order to knock them out and kept his own "knock-out list" of prisoners whom he had rendered unconscious. *Ibid.* After beating prisoners or encouraging other officers to beat them, petitioner would routinely deny the victims medical care and falsify incident reports to cover up his and his co-conspirators' actions. *Ibid.* Petitioner's "pattern of behavior ultimately resulted in the death" of a detainee under his supervision. *Id.* at A60. Petitioner therefore "deserved a sentence of life imprisonment" regardless of whether he acted with the malice necessary to establish second degree murder. *Id.* at 61.[5]

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[5] Petitioner's argument to the contrary depends on an incorrect premise. Petitioner contends that, absent the finding that he committed second degree murder, his offense level would have been based on the guideline for involuntary manslaughter and an upward variance from the sentencing range that results from the involuntary manslaughter guideline "would be an unprecedented escalation of a sentence," which no reviewing court would uphold as reasonable. Pet. 27. Actually, as Judge Moore explained, if there had been no finding that petitioner committed second degree murder, his offense level would have been based on the guideline for aggravated assault. Pet. App. A53 n.10. Aggravated assault is the "underlying offense" (Guidelines § 2H1.1(a)) that produces the highest base offense level, and the conclusion that petitioner committed that offense is amply supported by the jury's

Moreover, petitioner was convicted of *six* civil rights crimes in addition to the crime for which he received the life sentence. Those additional crimes included conspiring to deprive detainees and prisoners of their constitutional rights and five substantive civil rights violations —two of which resulted in severe injuries to his victims. Each of those six crimes carried a ten-year prison term that petitioner has not challenged. Additional evidence established overt acts of the conspiracy that were not charged as substantive offenses. That evidence further supports the reasonableness of petitioner's life sentence.

For all these reasons, petitioner's life sentence would be upheld as reasonable upon appellate review even if the court had not found that he committed second degree murder. Because petitioner cannot "demonstrate that his sentence * * * would not have been upheld but for the existence of a fact found by the sentencing judge," *Gall*, 128 S. Ct. at 603 (Scalia, J., concurring), his "as applied" Sixth Amendment challenge does not warrant this Court's review.

3. This Court has recently denied certiorari in several cases involving similar claims. See, *e.g.*, *Bradford* v. *United States*, 128 S. Ct. 1446 (2008); *Alexander* v. *United States*, 128 S. Ct. 1218 (2008). The same result is warranted here.

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special verdict that petitioner's violation of Kuntz's civil rights resulted in his bodily injury. See Pet. App. A53 n.10; note 2, *supra*. That base offense level, when adjusted for the 14 levels of enhancements that petitioner has not contested (see note 3, *supra*) and two additional enhancements supported by the jury's verdict (see Pet. App. A53 n.10), yields an advisory Guidelines range that extends to well over 20 years of imprisonment. See *ibid.* In light of the heinousness and depravity of petitioner's conduct as found by the jury, he cannot show that an upward variance to life imprisonment from that Guidelines range would be unreasonable.

Indeed, this Court's review would be particularly inappropriate in this case because petitioner did not raise his "as applied" Sixth Amendment claim until his reply brief in the court of appeals. The Sixth Circuit has a "well-established practice of refusing to address issues which an appellant raises for the first time in his reply brief." *Chatman* v. *Slagle*, 107 F.3d 380, 386 n.7 (6th Cir. 1997). Consistent with that practice, the opinion for the court of appeals did not address petitioner's claim. Instead, the claim was addressed only in the concurring opinion of Judge Moore. This Court's "traditional rule" against granting a writ of certiorari when "the question presented was not pressed or passed upon below" thus provides an additional reason to deny the petition for a writ of certiorari. *United States* v. *Williams*, 504 U.S. 36, 41 (1992).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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